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No. 406

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

TRI-CITY BROADCASTING CO.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Appellee.

STATEMENT OPPOSING JURISDICTION.

The appellee in the above entitled cause, for its statement in opposition to appellant's statement as to jurisdiction herein and in support of appellee's motion to dismiss or affirm, respectfully states the following:

I.

STATEMENT OF CASE AND FACTS

The operative facts have been stipulated and are quoted in full on pages 7 and 8 of appellant's jurisdictional statement. The following is a summary of facts and history of this case.

Appellant owns and operates a television station with studios at Wheeling, West Virginia, and with the transmitter located in Bridgeport, Ohio. Appellant purchased certain items of transmitting equipment from Radio Corporation of America, Camden, New Jersey. Said items of equipment were shipped ready for installation by motor freight directly from New Jersey, to the transmitter at Bridgeport, Ohio. Pursuant to operating authority granted by the federal government, appellant began transmitting operations on July 30, 1953. Thereafter, appellant installed additional items of transmitting equipment as they arrived at the transmitter, within one to three days after arrival to bring the transmitter power up to its permitted assigned power.

The Tax Commissioner of Ohio issued a use tax assessment against appellant, an Ohio corporation, based on the use in Ohio of said transmitting equipment purchased outside the state of Ohio. Said assessment was paid and subsequent thereto the appellant made application on July 31, 1956, for refund of said use tax payment. The application was disallowed and appellant appealed to the Board of Tax Appeals of Ohio. The Board entered its decision holding that Section 5741.02, Revised Code of Ohio, imposed a use tax on the personal property in every instance where a person in Ohio uses goods purchased at retail *outside* Ohio and brought *into* this state for use here, excepting of course the specified statutory exemptions. An appeal was perfected to the Court of Appeals of Belmont County, Ohio. That Court reversed the decision of the Board of Tax Appeals. The Tax Commissioner then appealed to the Supreme Court of Ohio and said Court reversed the Court of Appeals, holding that the use tax was properly assessed.

II

QUESTION PRESENTED

The essential question presented is whether the Tax Commissioner properly refused to refund to appellant the use taxes it paid on the purchase of certain transmitting equipment. This question involves the determination of whether the Constitution of the United States prohibits a use tax upon the single local activity of storing and or installing the articles immediately before they begin to be used in an interstate operation. Put another way is a state prohibited from taxing goods purchased out of state; installed within the taxing state and said installation to be used as an instrumentality of interstate commerce?

III

ARGUMENT

A. Section 5741.02, Revised Code of Ohio, Does Not Burden or Discriminate Against Interstate Commerce.

Chapter 5741. of the Revised Code of Ohio, is titled Use tax; storage tax. Section 5741.02 of said chapter provides in pertinent part:

> "(A) For use of the general revenue of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property purchased for storage, use, or other consumption in this state * * *
>
> "* * *
>
> "(B) Each consumer, storing, using or otherwise consuming in this state tangible personal property purchased for such purpose, shall be liable for the tax * * *
>
> "* * *
>
> "For the purpose of the proper administration of sections 5741.02 to 5741.22, inclusive, of the Revised Code, and to prevent the evasion of the tax hereby levied, it shall be presumed that tangible personal property purchased by any person for delivery in this state is purchased for storage, use, or other consumption in this state."

The appellant, in attempting to establish its contention that the tax does not apply, has relied upon the following portion of Section 5741.02, Revised Code, the levying statute:

> "(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following circumstances:
>
> "* * *

> "(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. * * *"

This provision makes the use tax inapplicable if the tax is prohibited by the Constitution or laws of the United States and the constitution of Ohio. The definition section of this Chapter, Section 5741.01, Revised Code, contains a legislative definition of "*use*" which establishes the sense in which that term must be applied in this case. The legislative definition is:

> "(C) 'Use' means and includes the exercise of any right or power incidental to the ownership of the thing used, except as provided in this division of this section."

Following this definition are five exceptions, none of which are pertinent to this appeal.

At the outset it is incumbent upon the Tax Commissioner to state that appellant's approach to the problem here presented is such that it evades the true issues before this Court and tends to confuse or mislead. The taxpayer considers Section 5741.02 (C), Revised Code, *as if* it read: The tax does not apply to property purchased for use in interstate commerce.

The actual language of that statute reads in pertinent part:

> "The tax does not apply to the storage, use, or consumption in this state of * * *
>
> "(3) Property, the storage, use or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. * * *"

Section 5741.02, Revised Code, contains a presumption of taxability. Therefore, a rule of strict construction ob-

tains in applying the exemption of subsection (C) (3) of the statute so that any ambiguity or doubt as to taxability should be resolved in favor of the taxing authority.

Appellant strenuously urges that Ohio use tax, imposed by this statute, cannot be apportioned between exempt and nonexempt uses; that the incidence of the tax is upon the principal and primary use of equipment; and that therefore the Ohio Use Tax Statute does not tax incidental storages or uses when the principal and primary use of the equipment is exempt. Appellant seeks to buttress these contentions by citing *Mead Corp. v. Glander*, 153 Ohio St., 539, 93 N.E. 2d, 19; *Erie Railroad Co. v. Peck*, 160 Ohio St., 322, 116 N.E., 2d, 304; *Rochez Bros., Inc. v. Bowers*, 166 Ohio St., 396, 143 N.E. 2d, 123. The Supreme Court of Ohio dismissed these arguments of appellant by stating in its decision:

> "None of the three cases * * * is pertinent here, inasmuch as each of those cases was determined solely upon a construction of the words of the Ohio Use-tax statute, and none involved a question of burden on interstate commerce." (Appellant's Jurisdictional Statement, Appendix III, pages 39-40.)

It is further submitted that the "*principal and primary use*" doctrine of Ohio is a concept of law which was developed in relation to the so-called *direct use* exemption from taxation. Direct use exemption can best be explained by quoting the specific portion of the statute involved. Section 5741.01, Revised Code, as previously stated, is the definitions section of the Ohio use tax provisions. Subsection (C) defines "Use" and follows with five exceptions, number 2 of which reads:

> "(2) To incorporate the thing purchased, as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining; or to use or consume the thing

transferred *directly in* the production of tangible personal property for sale by manufacturing, processing, refining, or mining, including without limitation the extraction from the earth of all substances which are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture, and persons engaged in rendering farming, agricultural, horticultural, or floricultural services, and services in the exploration for the production of crude oil and natural gas, for others, are deemed engaged *directly in* farming, agriculture, horticulture, or floriculture, or exploration for and production of crude oil and natural gas; or *directly in* making retail sales or *directly in* the rendition of a public utility service; * * *" (Emphasis added)

Here and here alone has the "*principal and primary use*" doctrine been applied. No Ohio court has applied said doctrine to an exemption claimed upon the basis of prohibition against the tax because of the Constitution or laws of the United States, but has limited it to the above quoted exemption. We are not faced with the question of whether certain property is "used directly" in an activity. We are concerned with whether the Constitution or laws of the United States prohibit the imposition of Ohio use tax upon the use of the property involved.

Appellant has repeatedly clung to its assertion that Ohio has discriminated against interstate commerce by ignoring Ohio's "principal and primary use" doctrine and assessed the taxpayer "* * * because appellant is engaged in interstate commerce." (Appellant's Jurisdictional Statement, page 10)

Further appellant states that it was

"* * * selected for a special tax burden merely because it happens to be engaged in the field of interstate commerce." (Appellant's Jurisdictional Statement, page 13)

The appellee concedes and the Supreme Court of Ohio recognized that the broadcasting of radio and television programs is interstate commerce. Moreover, as observed by the Supreme Court of Ohio:

> "It does not follow, however, that interstate commerce is immune from taxation by a state. * * *" *Midwest Haulers, Inc. v. Glander*, 150 Ohio St., 402, at 404.

The mere fact that a company may be engaged in interstate commerce does not magically clothe the company in a blanket of exemption from all state taxes.

An interesting analogy to the case at bar was presented in *Memphis Natural Gas Co. v. Stone*, 335 U. S., 80, 92 L. Ed., 1832 (1948). In that case the state of Mississippi had imposed a franchise tax based upon the amount of capital used by the company within the state. The appellant did no local business within the state; it merely maintained a pipeline a distance of 135 miles across the state of Mississippi. Mr. Justice Reed, in delivering the opinion of the Supreme Court and in sustaining the tax, observed that the company was engaged only in interstate commerce and that the tax was based upon the cost of the portion of the pipeline located in Mississippi. At page 1839 of the opinion in the *Memphis Gas* case the following comments appear:

> "There is no question here of Due Process. The Gas Company's property is in the taxing state where the taxable incidents occurred. * * * The attack on the Mississippi statute is that it violates the Commerce Clause by putting a tax on the commerce itself.
>
> "The local incidents covered by the definition of doing business hereinbefore set out, Section 9312, Mississippi Code, supra, were said by the Supreme Court in this case to be "the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system' in Mississippi. 201 Miss. 670, 674, 29 So. 2d 268, 270. The cases just cited in the

note show that, from the viewpoint of the Commerce Clause, where the corporations carry on a local activity sufficiently separate from the interstate commerce state taxes may be validly laid, even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon the interstate business itself. But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation. Nippert v. Richmond, supra (327 US at 423, 90 L. ed. 764, 66 S. Ct. 586, 162 ALR 844). The incident selected should be one that does not lend itself to repeated exactions in other states. . . ." (Footnote omitted.)

Mr. Justice Reed concludes the opinion in these pertinent words:

". . . We think that the state is within its constitutional rights in exacting compensation under this statute for the protection its affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business." (p. 1844)

Mr. Justice Rutledge concurred and stated at pages 1844 and 1845 of the decision as reported in 92 *Lawyers' Edition*:

"In accordance with views which I have heretofore expressed, it is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar as any limitation of due process or 'jurisdiction to tax' in that sense is concerned; it is nondiscriminatory, that is, places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character; is duly apportioned, that is, does not

undertake to tax any interstate activities carried on outside the state's borders; and cannot be repeated by any other state.

"In this view the tax is not different in any substantial respect, for purposes of the commerce clause's prohibitive application, from the apportioned tax upon gross receipts from interstate transportation levied by New York and sustained by the decision recently rendered in Central Greyhound v. Mealey, 334 US 653, ante, 1633, 68 S. Ct. 1260. That tax is nonetheless one upon the commerce, although it is apportioned. The apportionment, however, guards it from the vice of taxing commerce done in other states and thus also from multiplication by them. In my view the same consequence follows here, in practical effect, both for the bearing of the tax and for saving its validity.

"It may be that for the purposes of this case there is little more than a verbal difference in so regarding the tax and in looking at it as one not 'upon' the commerce, although affecting it, but as being laid upon 'incidents' of the commerce or 'taxable events' taking place in Mississippi which are regarded as being 'sufficiently separate from' the commerce, whether by reason of the apportionment or otherwise, to sustain the tax. . . ."

It is submitted that the *Memphis Gas* case points out the rationale for state taxation of interstate commerce. Such commerce should not be and is not exempted from all state taxation. It must pay its fair share of state tax. Thus, even gross receipts of interstate commerce are subject to state taxation if the proper allocation is made. The basis for this, it would seem, is the selection of an incident peculiar to the state imposing the tax which thus assures the avoidance of "repeated exations" or multiplication of the tax. It seems to follows clearly then that when tangible personal property of a company engaged in interstate commerce acquires a situs in a particular state, the imposition of a tax on that property by the state does not directly

interfere with nor unduly burden interstate commerce. Perhaps the leading cases on the issues of the instant cause are two California cases decided by the Supreme Court of the United States in 1939: *Southern Pacific Co. v. Gallagher*, 306 U. S., 167, 83 L. Ed., 586, and *Pacific Telephone & Telegraph Co. v. Gallagher*, 306 U. S., 182, 83 L. Ed., 595. Both cases involved a tax on use and storage as applied to supplies purchased outside a state and brought in for prompt application in the operation of a public utility. The California Use Tax, like the Ohio Use Tax, is complemental to the California Retail Sales Tax. Property covered by the California Sales Tax is exempt under the California Use Tax. All tangible personal property sold or utilized in California (and Ohio), is taxed only *once* for the support of the state government.

In the *Southern Pacific* case, an interstate railroad purchased tangible personal property outside California, brought such property into the state and (1) installed it upon importation, or (2) kept it available for use. At page 171 of the official report, the Court set forth the applicable definitions in the California Use Tax Act, which definitions are practically identical to those found in the Ohio law, Section 5741.01, Revised Code. The Supreme Court of the United States properly categorized the tax at page 172, when it said that the tax was sought:

> "* * * from tangible personalty purchased out of the state for immediate or subsequent installation in an interstate railway facility."

At page 173, the Court said:

> "All purchases may be said to be dedicated to consumption in the interstate transportation business of appellant."

In discussing the property which was to be installed upon delivery, this Court stated at pages 176 and 177:

> "* * * In the present case some of the articles were ordered out of the state under specification suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination. If articles so handled are deemed to have reached the end of their interstate transit upon 'use or storage', no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison, farther removed from interstate commerce. We think *there was a taxable moment* when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. *At that moment*, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate movement was complete. The interstate consumption had not begun. * * * *" (Emphasis added.)

On the same day that the *Southern Pacific* case was decided, the Court also handed down its opinion in *Pacific Telephone & Telegraph v. Gallagher, supra*. The taxpayer in that case operated a telephone and telegraph system in interstate and intrastate commerce. Certain property was purchased out of state and upon arrival was immediately installed. In sustaining the California Use Tax the Court relied upon the *Southern Pacific* case and said at page 187:

> "The appellant exercises two rights of ownership in California—retention and installation—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material distinction between the contentions of the appellant and those disposed of in *Southern Pacific Co. v. Gallagher, ante*."

The Supreme Court of Ohio, in ruling upon the instant case and commenting upon the *Southern Pacific* and the *Pacific Telephone* cases stated:

> "In those two cases the United States Supreme Court clearly recognized the right of the state to tax items such as those here under consideration at the moment of completion of interstate shipment into the state and the retention and installation. However the subsequent use of the equipment in interstate commerce such as the appellee contends to be the 'principal and primary use' of the items here under consideration is disposed of further in the opinion in the *Southern Pacific case, supra*, in the following language (page 177):
>
> "'Practical continuity', does not always make an act a part of interstate commerce. This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant. The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operation as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from instrumentalities of commerce and foreign commerce to the Congress.'"

The Supreme Court of Ohio concluded at page 133 and 134 of its opinion:

> "By the foregoing test we are led to the conclusion that there is no interference by the State of Ohio with interstate commerce under the circumstances presented in this case. The use tax imposed on the per-

sonal property of the appellee here is imposed in every instance where a person in Ohio uses goods purchased at retail outside Ohio and brought into this state for use here, excepting of course the specified statutory exemptions. Certainly, real estate in Ohio is not exempt solely because it may be used in interstate commerce.

"The use tax is not applied on the basis of residence or non-residence of the taxpayer but rather upon the sole test of use in Ohio regardless of whether it is used in interstate or intrastate commerce, assuming, of course, that it is not otherwise exempt."

In the treatise "*State Taxation of Interstate Commerce*," by Paul J. Hartman, Professor of Law, Vanderbilt University, published 1953 by Dennis & Co., Inc., Library of Congress Catalog Card No. 53-11622, the author deals with a state's right to levy a use tax in cases such as presented here. Professor Hrtman discusses many decisions of the United States Supreme Court, beginning with the first case on the subject, i.e., *Nashville C. & St. L. Ry. v. Wallace*, 288 U. S., 249 (1933) and following the problem through various decisions, including the two California cases hereinbefore cited.

The author concludes, at page 141, in this manner:

"This group of cases, and precedents analogous to them, thus permits state taxation of events preliminary to interstate movement, even though the articles involved are intended for subsequent use in interstate commerce, and even if the articles have just completed an interstate journey. There is a taxable moment, brief though it may be, when the articles have reached the end of an interstate trip and have not begun to be consumed or used in an interstate operation."

Further, at page 146, the author reiterates:

"* * *, use and storage taxes upon the single local activity of storing or installing the articles immediately before they begin to be consumed in an inter-

state operation are valid, even though the State had a taxable grasp for only a brief moment. Also property taxes levied on the means and instrumentalities used to carry on interstate commerce are valid."

B. Broadcasting Is National in its Scope and Congress Has Pre-empted the Field—on Certain Matters.

Appellant argues that broadcasting is national in scope and Congress has pre-empted the field. To a degree this is admittedly a sound proposition of law. Appellant then concludes that the assessment of a use tax, even indirectly, on the privilege to use broadcast transmitting equipment in interstate commerce or to install it for such use, is an unconstitutional invasion of a province exclusively within the bounds of federal jurisdiction. This assertion by appellant cannot be sustained with even the broadest interpretation of the federal pre-emption doctrine. Appellant is literally claiming that since broadcasting is federally regulated, no state may tax, legislate, govern or control said broadcasting in any way, shape or form.

Appellant, in support of its pre-emption theories, states on page 17 of its jurisdictional statement that:

> "The practical consequences of a state use tax on the installation or use of transmitting equipment are apparent. Through such a tax a state could easily *discourage* the location of stations within its borders and could even *affect a freeze* on new installations to the benefit of already existing stations. *Magnano v. Hamilton* 292 U. S., 40, 78 L.Ed., 1109, 54 S.Ct., 599. Hence by the device of a use tax upon the installation or use of transmitting equipment the state could not only *control* the broadcast service rendered *but also the stations rendering it*, and the effect of that control would necessarily extend beyond the State's borders since the stations broadcast into other states. This, of course, is the type of interference which the Communications Act (47 USCA, Chapter 5) was especially designed to eliminate." (Emphasis added)

The most charitable comment that can be made of these charges and allegations is that they are highly misleading and without foundation. As stated previously this Ohio Use Tax is correlated to the Ohio Sales Tax. If an item is taxed in the latter, it is exempt in the former. Ohio use tax is *not* an annual tax. It is imposed *only* at the time that the property is brought *into* the state for use *within* the state. It cannot be repeated either by the state of Ohio in subsequent periods or by any other state. The tax is neither recurrent nor subject to multiplication. The incidence of tax is single. It is *not* a tax upon the privilege of engaging in interstate commerce. It is *not* a tax levied upon particular classes. It is an excise tax levied upon the sale or use of property. Appellant's charges that said tax could "*discourage*" location of stations, "*effect a freeze*" on new installations, "*control*" the broadcast service and control the stations rendering it are absurd to say the least. A mere recitation of these charges are sufficient to point out their merit.

In 1948-49 Stanford Law Review, 740, in an article entitled "*Gross Receipts Taxes on Radio Stations*", the author asks "Has Congress Pre-empted the Field?" and answers, at pages 740 and 741:

> "To protect the wave bands of each radio station in the limited broadcast spectrum, Congress passed the Federal Communications Act which required licensing of all stations. Since interference by other stations cannot be tolerated, this field requires uniform regulation. The Act therefore precludes state regulation of the transmission of radio waves regardless of whether the waves ever leave the state of origin.
>
> "The question then arises whether this Congressional action prevents the states from taxing the radio industry. This question must be answered in the negative * * * Congress has undertaken only to license radio stations. * * * *The Act makes no attempt*

to restrict the state's power to tax. * * * * (Footnotes omitted; emphasis added.)

Further, this Court is respectfully reminded that the Ohio use tax here in question is upon ~~an instrumentality~~ of interstate commerce *after* it was shipped into Ohio and *before* it was installed and or used in interstate commerce, i.e., transmitting television waves. The Ohio use tax in no way regulates broadcasting stations, wave lengths, licensing, or the like. The specific field pre-empted by the Congress of the United States remains intact.

IV

CONCLUSION

It is submitted that neither the Constitution of the United States nor the laws of the United States prohibit the imposition of a use tax upon goods purchased outside the taxing state and shipped in for use or storage in the taxing state. This is true even though the purchased goods are to be used and consumed in interstate commerce. A taxable event is present, however brief, at the instant the goods come to rest in the interstate journey and before they are used or consumed in the interstate business.

Further, it is submitted that although the Congress of the United States has recognized certain features of broadcasting require uniform legislation and has, therefore, pre-empted said matters, it does not follow as a necessary corollary that the state's power to tax has been restricted in any way.

V

MOTION TO DISMISS OR AFFIRM

For the foregoing reasons and based upon the foregoing authorities, this appellee moves that the court dismiss the appeal of this appellant or affirm the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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REPLY TO STATEMENT OPPOSING JURISDICTION

I.

Section 5741.02, Revised Code of Ohio, as Construed and Applied by the Supreme Court of Ohio, Burdens and Discriminates Against Interstate Commerce in Violation of the Constitution of the United States.

Nowhere in the statement opposing jurisdiction does the tax commissioner undertake to defend the discrimination which the Ohio Supreme Court's construction and application of Section 5741.02, Revised Code of Ohio, place upon interstate commerce. Instead he argues on page 5 that there is no exemption for interstate commerce in the use tax statute. Section 5741.02 (C) (3), Revised Code of Ohio, provides an exemption for uses which the state cannot

constitutionally tax, and this includes the use of interstate commerce instrumentalities, *Helson v. Kentucky*, 279 U.S. 245, 73 L. Ed. 683, 49 S. Ct. 279; *Cooney v. Mountain States Telephone and Telegraph Co.*, 294 U.S. 384, 79 L. Ed. 934, 55 S. Ct. 477; *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 83 L. Ed. 586, 59 S. Ct. 389; *Pacific Telephone and Telegraph Co. v. Gallagher*, 306 U.S. 182, 83 L. Ed. 595; 59 S. Ct. 396; *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L. Ed. 993, 67 S. Ct. 815; *Station WBT v. Poulnot*, 46 F. 2d. 671.

But even without an exemption, it is absurd to argue that Ohio can impose an unconstitutional tax simply because its statute does not contain an exemption from the tax. The Constitution is still the supreme law of the land.

Turning next to page 7 of the commissioner's statement, he there asks this Court to construe the Ohio statute so that the principal and primary use rule will apply to the exemptions appearing in Section 5741.01, Revised Code of Ohio (the definition section) but not to those in Section 5741.02, Revised Code of Ohio (the levying section). This exact same argument was made below to the Ohio Supreme Court both in the brief and on oral argument and was flatly rejected. The Court drew no distinction between the two sections, and no such distinction has ever been drawn by Ohio courts. The argument was also rejected in this case by the Ohio Court of Appeals. And in any event questions of the construction of a state statute are beyond the jurisdiction of this Court.

Some preliminary remarks should be made about *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 92 L. Ed. 1832; 68 S. Ct. 1475, cited on page 8 of the commissioner's statement. The commissioner says that Mr. Justice Reed delivered the opinion of the Court. This is incorrect. Mr.

Justice Reed's opinion was concurred in by only two other justices. Mr. Justice Rutledge wrote a separate opinion in which no member of the Court concurred. And Mr. Justice Black concurred in the judgment but not in the opinions. The Chief Justice, together with three justices lodged a vigorous dissent. The case was decided five to four, with the majority divided—hardly a firm authority.

Of more importance, however, there was no issue of discrimination in the case, as there is here, and consequently it is inapplicable as authority for this case.

Aside from the *Memphis Natural Gas* case, the commissioner also quotes at length from *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167, 83 L. Ed. 586, 59 S. Ct. 389, and *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U.S. 182, 83 L. Ed. 595, 59 S. Ct. 396. As was said in appellant's jurisdictional statement, the statute in the *Gallagher* cases taxed any and every use of property. Installation was, therefore, a taxable activity for all taxpayers alike. To the contrary, until the present case, the Ohio statute had without exception always been held to tax principal and primary use and never such minor incidental uses as installation. Despite this and even though the Ohio Supreme Court actually recognized that the principal and primary use of appellant's equipment is in interstate commerce and exempt from the tax on that ground, it nevertheless held that because interstate commerce was involved the extremely brief incidental use in installing the equipment was taxable. The statute thus construed raises an obvious and unjustifiable discrimination against interstate commerce which was absent in the *Gallagher* cases and the *Memphis Natural Gas* case.

The discrimination is actually conceded by the tax commissioner on page 6 of the statement where he attempts to distinguish *Mead Corp. v. Glander*, 153 Ohio St. 539, 93 N.E. 2d 119; *Erie Railroad Co. v. Peck*, 160 Ohio St. 322, 116 N.E. 2d 304; and *Rochez Bros. Inc. v. Bowers*, 166 Ohio St. 396, 143 N.E. 2d 123. These are the root cases which establish that the Ohio use tax is only against the principal and primary use. Now, why is it that these cases should not apply with equal force to interstate commerce? The reason given is quoted from the opinion of the Ohio Supreme Court on page 6 of the commissioner's statement:

> " 'None of the three cases * * * is pertinent here, inasmuch as each of those cases was determined solely upon a construction of the words of the Ohio Use-tax statute, and none involved a question of burden on interstate commerce. (Appellant's Jurisdictional Statement, Appendix III, pages 39-40.)' "

In other words, if the appellant were claiming another exemption besides burden on interstate commerce, the regular rule of principal and primary use would admittedly apply and the tax would not have been assessed. What more open admission of discrimination could possibly be made? Only those taxpayers engaged in interstate commerce activities have to pay tax on installation, no one else.

For the reasons stated above and those set forth in appellant's jurisdictional statement, appellant respectfully submits that the issues of discrimination and burden to interstate commerce are substantial.

II.

Broadcasting is National in its Scope and Congress has Pre-empted the Field.

A few brief comments will answer the commissioner's argument on this topic. On page 16 of the statement he says that the use tax will have no effect on interstate commerce because it is imposed but once. To quote his language: "It is imposed *only* at the time that the property is brought *into* the state for use *within* the state." Of course, the use is not confined "within" the state, but extends beyond the state. And a state by means of this kind of tax can prevent the installation of broadcasting equipment through a use tax on that installation. This means that a state can exercise control over broadcasting in its interior, and it means as well that it can extend the control to other states. The tax needn't be annual for that purpose; the power to impose the tax once at the beginning on installation is enough because the very existence and continued operation of any broadcasting station depends upon the periodic installation of new equipment for that which has become obsolete or worn out, and the instant tax falls directly on that installation.

Finally, the comment from 1948 49 Stanford Law Review, page 740, is the opinion of an editorialist, and even if it were authority, it is discussing gross receipts taxes which, unlike the instant tax, are laid upon receipts rather than upon a necessary and indispensable use of the means of broadcasting. That privilege of use is derived exclusively from the federal government, and it is protected exclusively by the federal government. The fact that the government has seen fit not to tax the use is suffi-

cient evidence of its intent that it be free from tax, and this intent cannot be frustrated or thwarted by the State.

Appellant concludes that the question of pre-emption of the field of broadcasting is substantial and of sufficient importance to merit review by this Court.

III.

CONCLUSION

Appellant respectfully renews its request that this appeal be allowed or, alternatively, should the appeal be denied, that certiorari be granted.

Respectfully submitted,

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